

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Paul S. Klein,

Plaintiff

v.

B. Stroud, et al.,

Defendants

2:16-cv-00637-JAD-VCF

**Order Screening Complaint, Staying
Case for 90 days, and Denying Motions
for Temporary Restraining Order and
Preliminary Injunction**

[ECF Nos. 7, 8]

Nevada state-prison inmate Paul S. Klein sues multiple defendants under 42 U.S.C. § 1983 for events that allegedly occurred while he was incarcerated at the High Desert State Prison.¹ Klein has also submitted an application to proceed *in forma pauperis*,² and he moves for a temporary restraining order³ and a preliminary injunction.⁴ I temporarily defer the matter of the filing fee, screen Klein's complaint, allow his claims to proceed, deny his motions for injunctive relief, and stay this case for 90 days to allow the parties a chance to settle their dispute.

Discussion

A. Screening standard

The Prison Litigation Reform Act directs federal courts to conduct a preliminary screening of any case in which a prisoner seeks redress from a governmental entity or officer or an employee of a governmental entity.⁵ In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous or malicious, fail to state a claim upon which relief may be granted, or seek

¹ ECF No. 1.

² ECF No. 5.

³ ECF No. 7.

⁴ ECF No. 8.

⁵ See 28 U.S.C. § 1915(a).

monetary relief from a defendant who is immune from that relief.⁶ To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under color of state law.⁷

Dismissal of a complaint for failure to state a claim upon which relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when reviewing the adequacy of a complaint. Pro se pleadings are liberally construed.⁸ And when a court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions for curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment.⁹

B. Screening Klein's complaint

Klein sues multiple defendants for events that allegedly occurred while he was incarcerated at the High Desert State Prison (HDSP): Warden Bruce Stroud; Associate Wardens Howell and Nash; Correction Officers (COs) Estill, Hesler, Lozano, Robertson, Norman, Werlinger, and Ames; Correctional Lieutenants Provencal and Adams, Correctional Sergeant Jay Barth; Nurses Wickham and Murphy; and Dr. Aranas.¹⁰ Klein asserts six counts and seeks monetary damages and injunctive and declaratory relief.

C. Counts I–V

Klein alleges that, on November 28, 2015, defendants Barth, Stroud, and Nash ordered COs Estill, Hesler, Werlinger, Robertson, and Norman to conduct a search of all Unit 1A porter cells,

⁶ See 28 U.S.C. § 1915A(b)(1)(2).

⁷ See *West v. Atkins*, 487 U.S. 42, 48 (1988).

⁸ *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

⁹ See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

¹⁰ ECF No. 1 at 2–6.

1 purportedly to locate “pruno,” or prison wine.¹¹ According to Klein, COs Norman and Werlinger
2 fabricated the pruno allegation in retaliation for Klein’s grievances complaining about the unsanitary
3 living conditions at the HDSP so that Klein would be fired from his unit porter job and be denied
4 parole based on the infraction.¹²

5 During the search, COs Estill, Hesler, Werlinger, and Norman took homosexual pictures and
6 publications from Klein’s cell and openly displayed them on Klein’s bed so that the other inmates
7 would see the materials.¹³ Defendants intended to cause Klein a potential problem with his cell
8 mate, a Mexican gang member who is not homosexual.¹⁴ As a result, Klein filed a Prison Rape
9 Elimination Act complaint against these defendants.¹⁵

10 Two days after the search, CO Estill wrote a notice of charges against Klein. Correctional
11 Officer Estill did not file charges against any of the other porters,¹⁶ and prison administrative
12 regulations require the written notice of charges to be filed on the date of the alleged violation.¹⁷ On
13 December 1, 2015, CO Lozano held a preliminary hearing without giving Klein a copy of the written
14 notice of charges against him.¹⁸ CO Lozano had attempted to orally relay the charges to Klein, but
15 Klein told him that he could not conduct the hearing without first providing him with a written notice
16 of charges.¹⁹ CO Lozano responded that his supervisor, Lt. Provencal, had authorized him to

19 ¹¹ *Id.* at 6, 44.

20 ¹² *Id.* at 6–7.

21 ¹³ *Id.* at 31–32.

22 ¹⁴ *Id.* at 32.

23 ¹⁵ *Id.*

24 ¹⁶ *Id.* at 20.

25 ¹⁷ *Id.* at 7.

26 ¹⁸ *Id.* at 14.

27 ¹⁹ *Id.*

1 conduct the hearing without first providing written notice.²⁰ At the hearing, CO Lozano told Klein
2 that “[CO] Norman got you and this was the only way he could get you fired without it looking like
3 he retaliated for your complaints and grievances over the unit not being cleaned.”²¹ Klein was fired
4 from his job as a unit porter. After the preliminary hearing but before the disciplinary hearing, Klein
5 wrote a letter to Warden Stroud informing him that Klein had not received written notice of the
6 charges against him. Stroud did not respond.²²

7 When Klein attempted to access his cell to retrieve documents necessary to defend himself at
8 his disciplinary hearing, CO Norman threatened to put him in the hole.²³ At the disciplinary hearing,
9 Klein told Correctional Sgt. Barth that he had never been served with a notice of charges;²⁴ Barth
10 responded, “who cares because you know you broke the rules.”²⁵ Sergeant Barth did not serve Klein
11 with a notice of charges until after the disciplinary hearing, and he found Klein guilty of violating an
12 unspecified rule.²⁶

13 Klein alleges that the cell search and resultant disciplinary proceedings were all in retaliation
14 for his grievances complaining about the “dangerous, unsafe, unsanitary, . . . nasty environmental
15 housing areas.”²⁷ And he indicates that all of the defendants, including Wardens Nash and Stroud
16 participated in the alleged retaliation and were aware of their subordinates’ actions. Additionally,
17 Klein had spoken to Wardens Stroud, Neven, and Howell about the unhealthy living conditions at
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20 ²⁰ *Id.*

21 ²¹ *Id.*

22 ²² *Id.* at 21.

23 ²³ *Id.* at 8, 35.

24 ²⁴ *Id.* at 8.

25 ²⁵ *Id.* at 9.

26 ²⁶ *Id.* at 26.

27 ²⁷ *Id.* at 24.

inmate-advisory-committee meetings²⁸ and he wrote to Warden Stroud to complain that he had not received written notice of the charges against him.²⁹ Counts one through five are most accurately construed as two separate claims for retaliation and due-process violations.

1. *Klein's retaliation claim may proceed.*

Prisoners have a First Amendment right to file prison grievances and to pursue civil rights litigation in the courts.³⁰ To state a viable First Amendment retaliation claim in the prison context, a plaintiff must allege: “(1) [a]n assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”³¹

Klein states a colorable retaliation claim. He alleges that he filed multiple grievances against prison officials in which he complained about the sanitary conditions in his unit and that, in retaliation for these grievances, the defendants fabricated allegations to search his cell and then instituted sham disciplinary proceedings against him so that he would lose his job as a unit porter and be denied parole. He also sufficiently alleges personal participation by the supervisor defendants because he alleges that they either directed the alleged violations or knew about them and did nothing to prevent them. Klein’s retaliation claim may proceed against defendants Barth, Stroud, Nash, Estill, Hesler, Werlinger, Robertson, Norman, Lozano, Provencal, Neven, and Howell.

2. *Klein's due-process claim may proceed.*

A prisoner is entitled to procedural due-process protections only when a prison disciplinary action “implicates a protected liberty interest in some ‘unexpected matter’ or imposes an ‘atypical

²⁸ *Id.* at 42–43.

²⁹ *Id.* at 21.

³⁰ *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004).

³¹ *Id.* at 567–68.

1 and significant hardship on the inmate in relation to the ordinary incidents of prison life.”³² Courts
2 look to three guideposts to determine whether a prison hardship is atypical and significant: (1)
3 whether the challenged condition “mirror[s] those conditions imposed upon inmates in
4 administrative segregation and protective custody;” (2) the duration of the condition, and the degree
5 of restraint imposed; and (3) whether the state’s action will invariably affect the duration of the
6 prisoner’s sentence.³³

7 When a protected liberty interest exists and a prisoner faces disciplinary charges, prison
8 officials must provide the prisoner with (1) a written statement at least 24 hours before the
9 disciplinary hearing that includes the charges, a description of the evidence against the prisoner, and
10 an explanation for the disciplinary action taken; (2) an opportunity to present documentary evidence
11 and call witnesses, unless calling witnesses would interfere with institutional security; and (3) legal
12 assistance where the charges are complex or the inmate is illiterate.³⁴

13 Though a prisoner does not have a protected property or liberty interest in prison
14 employment,³⁵ Klein alleges that, in addition to losing his job as a result of the disciplinary
15 proceedings against him, his parole eligibility will be negatively impacted. Because it appears that
16 the state’s action may affect the duration of Klein’s sentence, he has alleged a protected liberty
17 interest for which he is entitled to procedural due-process protections.

18 Klein has also alleged violations of these protections: he did not receive written notice of the
19 charges against him and he did not have the opportunity to present documentary evidence to refute
20 the charges. When he attempted to return to his cell to retrieve these materials, he was threatened
21 with confinement in the hole. Klein also alleges that he was never informed of the precise charges
22 he was found guilty of. Finally, he alleges sufficient supervisory involvement because he claims that
23 he wrote to Warden Stroud to complain about the alleged due-process violations and that Stroud did

24 ³² *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003).

25 ³³ *Sandin v. Conner*, 515 U.S. 472, 486–87 (1995).

26 ³⁴ *See Wolff v. McDonnell*, 418 U.S. 539, 563–70 (1974).

27 ³⁵ *Walker v. Gomez*, 370 F.3d 969, 973 (9th Cir. 2004).

1 nothing to stop them and that Lt. Provencal directed and ratified the violations. I therefore find that
2 Klein states a colorable due-process claim, and this claim will proceed against defendants Estill,
3 Lozano, Barth, Norman, Stroud, and Provencal.

4 **D. Count six may proceed.**

5 Count six is a claim for deliberate indifference to serious medical needs against Dr. Aranas,
6 Nurse Murphy, CO Ames, Lt. Adams, and Wardens Neven, Stroud, and Nash.³⁶ Klein alleges that
7 he discovered that his medical records had been destroyed after an unknown inmate mailed Klein
8 several pages of his medical records that he had found in an open trash bin by the Northern Nevada
9 Correctional Center's medical building. Klein investigated and discovered that all of his medical
10 records from 1990 through 2009 had been destroyed by an unknown party who had thrown his
11 records into an open trash bin.³⁷

12 Defendants Aranas, Nash, Murphy, Ames, Howell, Wickham, and Adams refuse to recreate
13 Klein's medical records or provide him any medical tests despite his repeated requests.³⁸ Prison
14 officials have started removing Klein's health restrictions/classifications because there are no longer
15 documents in Klein's file to support them.³⁹ For example, prison officials have stopped treating
16 Klein for his breathing, heart, and nerve problems and have removed the flat-yard restriction and no-
17 meat-medical-diet restriction from Klein's file.⁴⁰ This failure to treat has resulted in dizzy spells,
18 panic attacks, and a loss of strength.⁴¹

22 ³⁶ ECF No. 1 at 54.

23 ³⁷ *Id.* at 55.

24 ³⁸ *Id.* at 10, 59.

25 ³⁹ *Id.* at 11.

26 ⁴⁰ *Id.* at 11–12, 57–59.

27 ⁴¹ *Id.* at 58.

1 The failure to provide medical treatment to a prison inmate violates the Constitution when (1)
 2 he has a “serious medical need” and (2) prison officials are “deliberately indifferent” to it.⁴² A
 3 medical need is serious when, viewed objectively, the failure to treat it “could result in further
 4 significant injury or the unnecessary and wanton infliction of pain.”⁴³

5 Klein states a colorable claim for deliberate indifference to his serious medical needs. He
 6 alleges that he has lost medical restrictions and classifications because there are no longer any
 7 medical records to support them. As a result, prison officials are purposefully failing to treat his
 8 chronic conditions and long-standing medical diagnoses based on the lack of medical records that
 9 they have lost or destroyed, and Klein has suffered further injury and unnecessary pain. Accordingly,
 10 count six will proceed against defendants Aranas, Nash, Murphy, Ames, Howell, Wickham, Adams,
 11 Neven, and Stroud.

12 **E. Motions for preliminary injunctive relief**

13 In his motions for a temporary restraining order and a preliminary injunction, Klein seeks a
 14 mandatory injunction directing prison officials to serve inmates with notice of charges before
 15 disciplinary hearings. Injunctive relief is an “extraordinary remedy, never awarded as of right.”⁴⁴ “A
 16 plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits,
 17 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
 18 equities tips in his favor, and that an injunction is in the public interest.”⁴⁵

19 Klein’s motions for injunctive relief are denied because he has not shown that he is likely to
 20 suffer irreparable harm without relief. Klein’s disciplinary hearing has already concluded, and he
 21 does not allege that he has a pending hearing for which he has not been provided written notice of
 22 the charges. Accordingly, Klein’s motions are denied.

24 ⁴² *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

25 ⁴³ *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citations omitted).

26 ⁴⁴ *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 24 (2008).

27 ⁴⁵ *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting
 28 *Winter*, 555 U.S. at 20).

Conclusion

Accordingly, IT IS HEREBY ORDERED that a decision on Klein's application to proceed *in forma pauperis* [ECF No. 6] is deferred, and the Clerk of Court is instructed to FILE the complaint [ECF No. 1].

IT IS FURTHER ORDERED that Klein's retaliation claim will proceed against defendants Barth, Stroud, Nash, Estill, Hesler, Werlinger, Robertson, Norman, Lozano, Provencal, Neven, and Howell;

Klein's due-process claim will proceed against defendants Estill, Lozano, Barth, Norman, Stroud, and Provencal; and

Klein's deliberate-indifference-to-serious-medical-needs claim will proceed against defendants Aranas, Nash, Murphy, Ames, Howell, Wickham, Adams, Neven, and Stoud.

IT IS FURTHER ORDERED that Klein's motion for a temporary restraining order [ECF No. 7] and motion for preliminary injunction [ECF No. 8] are DENIED.

IT IS FURTHER ORDERED that this action is STAYED until January 5, 2017, to allow the parties an opportunity to settle their dispute before an answer is filed or the discovery process begins. During this 90-day stay period, no other pleadings or papers may be filed in this case, and the parties may not engage in any discovery. The court will refer this case to the Inmate Early Mediation Program, and the court will enter a subsequent order. On or before January 5, 2017, the Office of the Attorney General must file the report form attached to this order reporting the results of the 90-day stay, even if a stipulation for dismissal is entered before the end of the 90-day stay. If the parties proceed with this action, the court will then issue an order setting a date for defendants to file an answer or other response. Following the filing of an answer, the court will issue a scheduling order setting discovery and dispositive-motion deadlines.

"Settlement" may or may not include payment of money damages. It also may or may not include an agreement to resolve plaintiff's issues differently. A compromise agreement is one in which neither party is completely satisfied with the result, but both have given something up and both have obtained something in return.

IT IS FURTHER ORDERED that, if any party seeks to have this case excluded from the

1 inmate mediation program, that party must file a “motion to exclude case from mediation” by
2 **October 26, 2016**. The responding party will then have seven days to file a response. No reply may
3 be filed. The court will then issue an order, set the matter for hearing, or both.

4 **The Clerk of the Court is directed to electronically SERVE a copy of this order and a**
5 **copy of Klein’s complaint [ECF No. 1] on the Office of the Attorney General of the State of**
6 **Nevada, attention Kat Howe.**

7 IT IS FURTHER ORDERED that the Attorney General’s Office must advise the court by
8 **October 26, 2016, whether it will enter a limited notice of appearance on behalf of defendants**
9 for the purpose of settlement. No defenses or objections, including lack of service, will be waived as
10 a result of the filing of the limited notice of appearance.

11 Dated this 5th day of October

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13 _____
14 Jennifer A. Dorsey
15 United States District Judge
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Paul S. Klein,
Plaintiff

v.

B. Stroud, et al.,
Defendants

2:16-cv-00637-JAD-VCF

Attorney General's Report of Results of
90-Day Stay

**NOTE: ONLY THE OFFICE OF THE ATTORNEY GENERAL WILL FILE THIS FORM.
THE INMATE PLAINTIFF WILL NOT FILE THIS FORM.**

On October 5, 2016, I issued a screening order under 28 U.S.C. § 1915A permitting several of Gant's claims to proceed. I also ordered the Office of the Attorney General of the State of Nevada to file a status report by January 5, 2017. By filing this form, the Office of the Attorney General complies.

REPORT FORM

[Identify which of the following two situations (identified in bold type) describes the case, and follow the instructions corresponding to the proper statement.]

Situation One: Mediated Case: The case was assigned to mediation by a court-appointed mediator during the 90-day stay. [If this statement is accurate, check **ONE** of the six statements below and fill in any additional information as required, then proceed to the signature block.]

_____ A mediation session with a court-appointed mediator was held on _____ [enter date], and as of this date, the parties have reached a settlement (even if paperwork to memorialize the settlement remains to be completed). (If this box is checked, the parties are on notice that they must SEPARATELY file either a contemporaneous stipulation of dismissal or a motion requesting that the Court continue the stay in the case until a specified date upon which they will file a stipulation of dismissal.)

_____ A mediation session with a court-appointed mediator was held on _____ [enter date], and as of this date, the parties have not reached a settlement. The Office of the Attorney General therefore informs the Court of its intent to proceed with this action.

1 _____ No mediation session with a court-appointed mediator was held during the 90-day
 2 stay, but the parties have nevertheless settled the case. *(If this box is checked, the*
 3 *parties are on notice that they must SEPARATELY file a contemporaneous stipulation*
of dismissal or a motion requesting that the Court continue the stay in this case until
a specified date upon which they will file a stipulation of dismissal.)

4 _____ No mediation session with a court-appointed mediator was held during the 90-day
 5 stay, but one is currently scheduled for _____ [enter date].

6 _____ No mediation session with a court-appointed mediator was held during the 90-day
 7 stay, and as of this date, no date certain has been scheduled for such a session.

8 _____ None of the above five statements describes the status of this case.
 9 Contemporaneously with the filing of this report, the Office of the Attorney General
 10 of the State of Nevada is filing a separate document detailing the status of this case.

11 * * * * *

12 **Situation Two: Informal Settlement Discussions Case: The case was NOT assigned to**
 13 **mediation with a court-appointed mediator during the 90-day stay; rather, the parties were**
 14 **encouraged to engage in informal settlement negotiations.** [If this statement is accurate, check
 15 **ONE** of the four statements below and fill in any additional information as required, then proceed to
 16 the signature block.]

17 _____ The parties engaged in settlement discussions and as of this date, the parties have
 18 reached a settlement *(even if the paperwork to memorialize the settlement remains to*
 19 *be completed)*. *(If this box is checked, the parties are on notice that they must*
 20 *SEPARATELY file either a contemporaneous stipulation of dismissal or a motion*
 21 *requesting that the Court continue the stay in this case until a specified date upon*
 22 *which they will file a stipulation of dismissal.)*

23 _____ The parties engaged in settlement discussions and as of this date, the parties have not
 24 reached a settlement. The Office of the Attorney General therefore informs the Court
 25 of its intent to proceed with this action.

26 _____ The parties have not engaged in settlement discussions and as of this date, the parties
 27 have not reached a settlement. The Office of the Attorney General therefore informs
 28 the Court of its intent to proceed with this action.

_____ None of the above three statements fully describes the status of this case.
 Contemporaneously with the filing of this report, the Office of the Attorney General
 of the State of Nevada is filing a separate document detailing the status of this case.

Submitted this _____ day of _____, _____ by:

Attorney Name: _____
 _____ Print _____ Signature _____

Address: _____ Phone: _____
 _____ Email: _____